

81. ENFORCEMENT OR REVIEW OF BOARD ORDERS

81.112: Enforcement – Jurisdiction – Board of Personnel Appeals

The Board of Personnel Appeals had jurisdiction to hear **UD #7-79** even though it failed to give notice of the pending action to the Miles City Police Protective Association (MCPPA) pursuant to MCA **39-31-207(1)(a(ii))**. “The City had not been prejudiced by the circumstance that the former bargaining unit (MCPPA) was not given notice. The MCPPA was aware of the pending proceedings for designation of a new bargaining unit had a ballot choice between the two bargaining units.” **UD #7-79 District Court (1980)**

81.18: Enforcement – Enforcement by Board of Personnel Appeals

“[T]he members of the Board of Personnel Appeals ... decided that the Board would not attempt to enforce any portion of their Final Order in **ULP #3-79** ... as long as the matter has been appealed to the Montana Supreme Court.” **ULP #3-79**

81.19: Enforcement – Enforcement by Courts

See **ULP #3-73 District Court (1974)**, **ULP #4-73 District Court (1974)**, **ULP #20-76 District Court (1977)**, and **ULP #5-80 District Court (1981)**.

81.191: Enforcement – Enforcement by Courts – Court Procedure

“Section **2-4-702, MCA**, governs judicial review proceedings under the Administrative Procedure Act, including review of decisions by the Board of Personnel Appeals.” **ULP #3-79 Montana Supreme Court (1981)**

See also **ULP #3-73 District Court (1975)**.

81.31: Review – Jurisdiction

“No party questions the venue in this case, and the Court concludes here that it has venue over the parties. The Court also concludes that it has jurisdiction over these matters and all of the parties. The Court has already decided this jurisdictional question when it concluded to continue the stay herein, pending outcome of the petitions for judicial review and adopts by reference herein its Order of June 8, 1977, in which it held that the Board of Personnel Appeals’ order, dated April 8, 1977, denominated ‘Final Order’, was a final decision relative to the composition of the collective bargaining unit at Montana State University for purposes of the Montana Administrative Procedure Act [Section **82-4216**] ... and was, therefore, reviewable by the district court.” **UD #11-76 District Court (1978)**

“Because the prior district court action on this matter involved consideration of the issue of jurisdiction only, we review the Board’s earlier unfair labor practice decision as well as its more recent decision on remedies.” **ULP #24-77 District Court (1985)**

“This Court has jurisdiction over the parties and subject matter herein.” **ULP #34-82 District Court (1985)**

“The Board’s order is subject to review by a district court pursuant to §39-31-409, MCA.” **ULP #24-77 Montana Supreme Court (1986).**

81.331: Review – Standards for Appeal – Unfair Labor Practice Orders

See **ULP #4-73 District Court (1974)** and **ULP #30-78 District Court (1980).**

“Section **39-31-105, MCA**, states: ‘All hearings and appeals shall be in accordance with the appropriate provisions of the Montana Administrative Procedure Act.’ Section **2-4-704(2), MCA**, provides in part: ‘The Court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: ... (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;...” **ULP #17-87 District Court (1989).**

81.333: Review – Standards for Appeal – Election and Representation Orders

See **UD #22-77 District Court (1978)**, **UD #7-79 District Court (1980)**, and **ULP #20-78 Montana Supreme Court (1979)** and **District Court (1981).**

81.374: Review – Parties – Necessary or Indispensable Parties

The State Board of Personnel Appeals is not required to be designated as a party on a petition for judicial review. “We believe that **Rule 19, M.R. Civ. P.**, does not, by its terms, contemplate inclusion of an administrative board as an indispensable party for purposes of judicial review.” **ULP #3-79 Montana Supreme Court (1981)**

81.46: Issues Common to Appeal or Enforcement Proceeding – Stay of Board Order While Court Proceedings Pending

“Before judicial review began, the agency order was stayed and the review was held in abeyance pending the outcome of **City of Billings v. Billings Firefighters Local No. 521 (Mont. 1982)** That case involved the grandfather clause as it pertained to bargaining units and bargaining agreements in existence in 1973, the effective date of the Act. After City of

Billings was decided judicial review commenced.” **UC #6-80 Montana Supreme Court (1985)**

See also **ULP #2-73 District Court (1974)**, **ULP #16-76 District Court (1977)** and **ULP #20-78 District Court (1980)**.

81.461: Issues Common to Appeal or Enforcement Proceeding – Stay of Board Order While Court Proceeding Pending – Criteria for Granting Stay

“Defendant ... has petitioned this Board to stay its Final Order until the District Court proceedings have been completed. In view of the fact that Ms. Roberta Sharp is presently employed and that the staying of this Board’s Final Order will not result in any pecuniary loss to Ms. Sharp, ... [it is ordered] stayed until the District Court proceedings are completed.” **ULP #39-76**

81.47: Issues Common to Appeal or Enforcement Proceeding – Record

“Where a striking teacher had not been rehired by a board of trustees following a strike and where after an administrative hearing the teacher was ordered rehired with backpay, the hearing record of the Board of Personnel Appeals, including several pages of testimony from witness tending to show that the teacher’s problems were strike-related, contained sufficiently substantial evidence to support the Board’s findings that the teacher’s discharge was the result of unfair labor practices and to support the order of the Board.” **ULP #28-76 Montana Supreme Court (1979)**

81.471: Issues Common to Appeal or Enforcement Proceeding — Record — Contents

“Our standard of review is whether the factual findings are ‘clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.’ Section **2-4-704(2)(e), MCA**. This issue poses a real dilemma, because there is no transcript of the initial hearing where there was live testimony by actual witnesses. . . . While all parties expend significant portions of their briefs arguing on the sufficiency of the evidence, we cannot consider any of these arguments in the absence of a transcript of the testimony at the original hearing.” **ULP #38-80 Montana Supreme Court (1986)**.

81.48: Issues Common to Appeal or Enforcement Proceeding – Additional Evidence [See also 09.3.]

“Issue no. 2 need not be considered or decided here because the resolution of issue no. 1 negates the need for additional evidence based on City of Billings to be received in this case.” **UC #6-80 Montana Supreme Court (1985)**

“Because the additional evidence was to relate to the due process claim, and because of our holding on that issue [that is, that *collateral estoppel* bars its relitigation], we conclude that this question is moot.” **ULP #38-80 Montana Supreme Court (1986)**.

81.49: Issues Common to Appeal or Enforcement Proceeding – General Principles

“The Court finds the challenged section of the Final Order of the Board of Personnel Appeals not in violation of constitutional and statutory provision, is not in excess of the statutory authority of the Board, was not made upon unlawful procedure, is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and is not arbitrary, capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.” **ULP #17-75 District Court (1978)**. See also **ULP #20-78 District Court (1980)**.

The Court found “ that no substantial rights of Plaintiff have been prejudiced.... Wherefore, by virtue of the foregoing and the statutory requirement that this Court not substitute its judgment as to the weight of the evidence on questions of fact, this Court concludes that there is substantial evidence on the whole record to support the aforesaid findings, conclusion, and final order of the State Board of Personnel Appeals, and therefore, the aforesaid findings, conclusion and order are hereby affirmed.” **ULP #20-78 District Court (1980)**.

81.491: Issues Common to Appeal or Enforcement Proceeding – General Principles – Review Confined to Record

“Montana has adopted the ‘clearly erroneous’ test and has accepted the definition that ‘A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’ **Brurud vs. Judge Moving & Storage Co., Inc., 1977, 563 P.2d 558, 559**.... Administrative agency action is further limited in that its findings of fact must be based upon the evidence in the record before it.... Since, upon judicial review, this Court cannot substitute its own judgment for that of the agency as the weight of the evidence on question of fact, Section **84-4216(7)**.... [T]he decision of the Board of Personnel Appeals to exclude all College of Engineering faculty members ... is hereby affirmed ... When an agency has not made findings of fact and conclusions of law in the first instance, however, the Court, upon review, should not enter any findings, by can only remand....” **UD #11-76 District Court (1978)**

“Specifically, the factual findings of the Board of Personnel appeals will be upheld if supported by substantial evidence. Section **39-31-401(4), MCA**. MAPA [Montana Administrative Procedure Act] allows factual findings to be overturned

when they are ‘clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.’ Section **2-4-704(2)(e), MCA**. We find these tests can be harmonized. If there is substantial credible evidence in the record, the findings are not ‘clearly erroneous.’ Under either statute the scope of judicial review is the same. If the record contains support for the factual determinations made by the agency, the courts may not weigh the evidence. They are bound by the findings of the agency.” **UC #1-77 Montana Supreme Court (1982)**

“Appellant argues that the District Court erred in considering alleged misconduct not mentioned in the notice of discharge.... There is a sufficient nexus between the other incidents considered by the District Court reflecting Carlson’s noncooperation and the discharge letter to warrant the District Court’s actions.” **ULP #10-80 Montana Supreme Court (1982)**

One of the issues on appeal was “whether the District Court abused its discretion by making findings of fact not based on the record and also by making findings of fact specifically contrary to the findings of the Board of Personnel Appeals.” The Court found that one of the District Court’s findings “was recognized by the hearing examiner but was not clearly stated in his findings. The District Court merely translated the hearing examiner’s finding, it did not substitute its judgment for that of the agency on the weight of the evidence on the question of fact. Therefore, the District Court was within its authority under **§2-4-704 MCA**, to make the challenged findings.” **Wage Appeal of Highway Patrol Officers v. Board of Personnel Appeals (1984)**

See also **UD #7-79 District Court (1980)**, **ULP #4-73 District Court (1974)**, **ULP #20-78 District Court (1980)**, and **ULP #30-79 Montana Supreme Court (1982)**.

81.492: Issues Common to Appeal or Enforcement Proceeding – General Principles – Waiver of Arguments not Raised before Board

“The District Court went on to decide the broader issue of whether the school district has to arbitrate the substantive basis on nontenured teacher nonrenewal.... The Board recognized that the issue as to whether nonrenewal was for just cause was not before it. It was unnecessary for the District Court to address the issue.” **ULP #30-79 Montana Supreme Court (1982)**

81.493: Issues Common to Appeal or Enforcement Proceeding – General Principles – Deference to Board Expertise

“The scope of judicial review for an unfair labor practice case is provided by section **39-31-409 MCA**. This statute provides, in essence, that the courts are not to substitute their judgment for that of the agency. The findings of the board as to questions of fact are conclusive if supported by substantial evidence on

the record considered as a whole. Section **39-31-406(4)**.” **ULP #28-76 Montana Supreme Court (1979)**

“In reviewing legal questions, the scope of review is broader. Where the intent of statutes is unclear, deference will be given to the agency’s interpretation.” **UC #1-77 Montana Supreme Court (1982)**

“We may also ask if the agency action is arbitrary, capricious or unreasonable.” **ULP #24-77 District Court (1985)**

“In regard to the timeliness of the hearing issue, since the statutes and rules are lacking (or unclear), this Court will give deference to Board of Personnel Appeals interpretation.” **ULP #38-80 District Court (October 1985)**

“We are also aware that the agency’s interpretation is usually entitled to great consideration, **Montana Consumer Counsel v. Public Service Commission ... (1975)**, but it has not demonstrated to us that this interpretation is of such long standing or so relied upon the deference to the agency is warranted. See **Bartels v. Miles City**.... This is particularly true in light of: (1) the agency’s representation that a Section 206 proceeding is extremely rare and that there are therefore no set rules or precedent interpreting the section or fleshing out its guidelines, and (2) the examiner’s finding that this union had never been certified even though it acted as an exclusive representative for an undetermined period of time.” **CC#2-81 District Court (1983)**

See also **UD #7-79 District Court (1980)**.

81.50: Issues Common to Appeal or Enforcement Proceeding – Standards for Review

“The Administrative Procedure Act applies to the Board and its actions (**39-31-104, 2-4-701, 2-4-102(2)** and **2-3-102**) and under that act we may reverse or modify the Board’s decision where either the findings of fact are ‘clearly erroneous in view of the reliable, probative and substantive evidence on the whole record (**2-4-704(2)(e)**) or the conclusions of law violate or are in excess of the statutory authority (**2-4-704(2)(a) and (b)**) or the action of the agency is arbitrary, capricious or characterized by an abuse of discretion (**2-4-704(2)(f)**).” **ULP #24-77 District Court (1985)**

“In order to strengthen the administrative process and to promote judicial economy, the Montana Supreme Court in **Vita-Rich Dairy, Inc. v. Department of Business Regulation, 553 P2d 980 (1976)** has limited judicial court. If the reviewing district court finds that (a) a fair procedure was used (b) questions of law were properly decided, and (c) the decision of the administrative body is supported by substantial evidence, then the administrative order should be

affirmed. This Court is not to substitute its judgment for that of the agency.”
ULP #3-79 District Court (1983)

“A decision by the Board of Personnel Appeals found that the refusal of a School District to arbitrate whether the procedural steps for nonrenewal of a nontenured teacher were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. On appeal, the District Court went on to decide the broader issue of whether the School District was required to arbitrate the substantive basis on nontenured teacher nonrenewal. The District Court exceeded the proper scope of judicial review.” **ULP #30-79 Montana Supreme Court (1982)**

“Section **2-4-704, MCA**, sets for the MAPA [Montana Administrative Procedures Act] standards of review to be followed by a district court when reviewing an agency decision.” **UC #1-77 Montana Supreme Court (1982)** See also **ULP #10-80 Montana Supreme Court (1982)**

“Standards for review to be followed by this court are set forth as Section **2-4-704, MCA**.... In the recent case of **City of Billings v. Billings Firefighters Local No. 521 [US #1-77 Montana Supreme Court (1982)]**... the Montana Supreme Court clarified the standards of review for findings of fact and conclusions of law to be used by the courts....” **ULP #38-80 District Court (October 1985)**

“In reviewing legal questions, the standard of review is abuse of discretion. **City of Billings v. Billings FireFighters (1986), 200 Mont. 421, 651 P.2d 627.**” **ULP #24-77 Montana Supreme Court (1986).**

See also **ULP #38-80 Montana Supreme Court (1986).**

81.502: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Findings of Fact

“The governing statute provides: ‘The court may not substitute its judgment for that of the agency as the weight of the evidence on questions of fact.’ Section **2-4-704(2), MCA**. There is substantial, and as we have herein noted, abundant evidence to support those determinations. Therefore, we reinstate the findings of the Board of Personnel Appeals that only the line battalion chiefs, the fire marshal and the communications officer are supervisors.” **UC #1-77 Montana Supreme Court (1982)**

“In considering whether a finding of fact should be sustained, we ask if it is supported by ‘substantial evidence’.” **ULP #24-77 District Court (1985)**

“Though conflict may exist as to whether McCormick asked for, but never received these overtime records, this testimony provides substantial evidence

to support the Board's finding that McCarvel was prepared to present the records, but was told they were not necessary. This settles the factual question." **ULP #24-77 District Court (1985)**

"Our review is confined to the question of whether there is substantial evidence to support the finding of the Board that Young had exercised reasonable diligence [in obtaining interim employment during the period in which he was laid off by the City]." **ULP #3-79 Montana Supreme Court (1984)**

"It is true that a court may not substitute its judgment for the agency's findings of fact.... Although these statements appear in the District Court's findings of fact, they are actually conclusions drawn from the facts found by the hearings officer, which the District Court accepted in Finding of Fact No. 3. There was no error committed by the District Court in this regard." **ULP #10-80 Montana Supreme Court (1982)**

" 'If the record contains support for the factual determination made by the agency, the court may not weigh the evidence. They are bound by the findings of the agency.'" **ULP #38-80 District Court (1985)**

" "The [d]istrict [c]ourt, to reverse these findings of fact, [has] to find the record bare of 'substantial credible evidence. " ' **City of Billings [US #1-77 Montana Supreme Court (1982)]** at 633. This Court finds no such shortage of evidence to support the Board of Personnel Appeals' decision." **ULP #38-80 District Court (October 1985)**

"The Board of Personnel Appeals' Finding that the teachers did not make themselves available and remain subject to the call of Petitioner after Jun 4, 1981, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." **ULP #34-82 District Court (1985)**

"The standard of judicial review of an agency's findings is set forth in §2-4-704(2)(e) MCA..." Wage Appeal of **Highway Patrol Officers v. Board of Personnel Appeals (1984)**

"We have determined that a finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.... Here the District Court was left with a definite and firm conviction that a mistake had been committed." Wage Appeal of **Highway Patrol Officers v. Board of Personnel Appeals (1984)**

"Although findings 6 and 11 are substantially factual, they are not entirely so. The findings also contain legal conclusions. It was the legal conclusions implicit in the hearing examiner's findings that were modified by the District Court."

Wage Appeal of **Highway Patrol Officers v. Board of Personnel Appeals (1984)**

One of the issues on appeal was “whether the District Court abused its discretion by making findings of fact not based on the record and also by making findings of fact specifically contrary to the findings of the Board of Personnel Appeals.” The Court found that one of the District Court’s findings “was recognized by the hearing examiner but was not clearly stated in his findings.” The District Court merely translated the hearing examiner’s finding, it did not substitute its judgment for that of the agency on the weight of the evidence on the question of fact. Therefore, the District Court was within its authority under **§2-4-704 MCA**, to make the challenged findings.” Wage Appeal of **Highway Patrol Officers v. Board of Personnel Appeals (1984)**

81.503: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Conclusions of Law

“The Board of Personnel Appeals’ interpretation of section **39-31-109, MCA**, the grandfather clause, is primarily a question of law.... The Board of Personnel Appeals’ interpretation of the grandfather clause is rational, does not involve an abuse of discretion and we reinstate.” **UC #1-77 Montana Supreme Court (1982)**

“**ARM [24.26.547]** does not limit the subject of investigation to that prescribed by the statute; it does not require the board to reach a conclusion as to whether there is a reasonable cause to believe a question of representation exists; it doesn’t elucidate as to what the hearing is supposed to be about, and it doesn’t require the board to even consider whether there is reasonable cause to believe the representation exists before calling an election. This is not implementation of the statute, it is legislation. Insofar as it does not implement that statute it need not be adhered to either by the board or the court.” **DC #22-77 District Court (1978)**

“In considering whether a conclusion of law should be sustained we ask if it is contrary to law.” **ULP #24-77 District Court (1985)**

“In reviewing legal questions, the scope of review is broader. Where the intent of the statutes is unclear, deference will be given to the agency’s interpretation.... Where it appears that the legislative intent is clearly contrary to agency interpretation, the courts will not hesitate to reverse on the basis of ‘abuse of discretion’.” **ULP #38-80 District Court (October 1985)**

“The Board of Personnel Appeals’ Conclusion that the Petitioner was under no obligation to pay the teachers for more than one day they reported for work is

characterized as abuse of discretion and constitutes an error of law.” **ULP #34-82 District Court (1985)**

“The Board of Personnel Appeals’ Conclusion that the payment to the teachers in inherently destructive of protected rights and that no proof of anti-union motivation of the Petitioner need be presented is characterized as abuse of discretion and constitutes an error of law.” **ULP #34-82 District Court (1985)**

“The Board of Personnel Appeals’ Conclusion that the conduct engaged in by Petitioner ... is clearly prohibited conduct under §39-31-401, MCA, is characterized as abuse of discretion and constitutes an error of law, and is prejudicial of substantial rights of the Petitioner.” **ULP #34-82 District Court (1985)**

Did the District Court err “by reversing the Board of Personnel Appeal’s conclusion of law that the school district had no legitimate business justification for making the payments[?] We first note that although the Board of Personnel Appeals and the Hearing Examiner characterized this conclusion as a finding of fact, it is more properly seen as a conclusion of law. Thus, that conclusion is subject to the ‘abuse of discretion’ standard of review.” **ULP #34-82 Montana Supreme Court (1986).**

81.504: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Mixed Questions of Law and Fact

“The determination of a bargaining unit involves mixed questions of law and fact as is hereafter discussed. In reviewing the Board of Personnel Appeals’ findings of fact and conclusions of law, we will be bound by the foregoing scope of review.” **UC #1-77 Montana Supreme Court (1982)**

“Although findings 6 and 11 are substantially factual, they are not entirely so. The findings also contain legal conclusions. It was the legal conclusions implicit in the hearing examiner’s findings that were modified by the District Court.”
Wage Appeal of Highway Patrol Officers v. Board of Personnel Appeals (1984)

81.505: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Interpretation of Statutes

“In reviewing legal questions, the scope of review is broader. Where the intent of statutes is unclear, deference will be given to the agency’s interpretation Where it appears that the legislative intent is clearly contrary to agency interpretation, the courts will not hesitate to reverse on the basis of ‘abuse of discretion’.” **UC #1-77 Montana Supreme Court (1982)**

“The Board of Personnel Appeals’ interpretation of the grandfather clause previously discussed, recognizes existing bargaining units containing

supervisory personnel in violation of section **39-31-201, MCA**. The Board recognized that public policy supports elimination of conflict of interest within a bargaining unit and therefore, notwithstanding its interpretation of the grandfather clause, sought to foster the spirit of the Act by adopting a legal test to eliminate actual substantial conflict. The validity of such a test is a question of law.” **UC #1-77 Montana Supreme Court (1982)**

“The statute is clear, and restrictive, with regard to the hearing to be held upon the filing of a decertification petition.... (Section **59-1606(1)(b))**” **DC #22-77 District Court (1978)**

See also **ULP #4-73 District Court (1974)** and **ULP #3-79 District Court (1981)** and **Montana Supreme Court (1982)**.

81.506: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Interpretation of Administrative Regulations

“**ARM [24.26.547]** does not limit the subject of investigation to that prescribed by the statute; it does not require the board to reach a conclusion as to whether there is a reasonable cause to believe a question of representation exists; it doesn’t elucidate as to what the hearing is supposed to be about, and it doesn’t require the board to even consider whether there is reasonable cause to believe the representation exists before calling an election. This is not implementation of the statute, it is legislation. Insofar as it does not implement the statute it need not be adhered to either by the board or the court.” **DC #22-77 District Court (1978)**

See **ULP #4-73 District Court (1974)**.

81.5081: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decision – Bargaining Orders

See **ULP #20-78 District Court (1980)** and **ULP #30-79 Montana Supreme Court (1982)**.

81.5082: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Board Deferral to Arbitration

“A ‘prearbitral deferral policy’ was first enunciated by the NLRB in Collyer.... We can distinguish Collyer on these factors alone. The Board’s findings ... show that the City’s conduct ‘does not lead one to believe that a stable collective bargaining relationship exists between the parties,’ that ‘there was no indication of a willingness on the part of the City to arbitrate,’ and that the ‘grievance procedure provided in the contract does not culminate in a final and binding decision.... [T]he City’s reliance on Section **39-31-310, MCA** is misplaced. It claims that the section is a legislative mandate that public employers are not

bound to go to final and binding arbitration, thereby nullifying any contrary NLRB ruling. In fact, the section is permissive, not mandatory. It merely allows the parties to agree voluntarily to submit any or all issues to final and binding arbitration. No such agreement was made here, nor does the contract require it.... Furthermore, the NLRB in *General American Transportation Corp.* (1977) ... held that the Collyer doctrine is not applicable in cases involving alleged interference with protected rights or employment discrimination intended to encourage or discourage the free exercise of those rights.... The charge here involves such alleged violations. Deferral is inappropriate in this case.” **ULP #3-79 Montana Supreme Court (1982)**

See also **ULP #3-79 District Court (1981)** and **ULP #5-80 District Court (1981)**.

81.5083: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Cease and Desist Orders

See **ULP #20-78 District Court (1980)**.

81.5084: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Conduct of Elections

“The writ of mandate [for the Board of Personnel Appeals to forthwith conduct an election] dated March 12, 1979 by the District Court for the Eleventh Judicial District ... is hereby vacated and set aside.” **ULP #20-78 Montana Supreme Court (1979)**

See also **ULP #20-78 District Court (1981)**.

81.5087: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Reinstatement and Back Pay [See also 74.33 and 74.34.]

“The make whole remedy begins to run at the time the illegal act occurs and terminates when the claimant’s reinstatement becomes effective.” **ULP #3-79 District Court (1983)**. See also **ULP #3-79 Montana Supreme Court (1984)**.

“The Board was correct in the formula it used in computing the back pay liability. The formula is set forth in *Woolworth Company* ... and *NLRB v. 7-Up Bottling Company*.... The formula effectuates the policies of the law was properly applied. **ULP #3-79 District Court (1983)**. See also **ULP #3-79 Montana Supreme Court (1984)**.

“[T]he Board’s method in calculating interest due and application thereof was proper.... Again, the purpose of Montana collective bargaining law is to make a person whole for his rights being violated. To hold otherwise would be in the

detriment of the person whose rights were violated and not consistent with the spirit or intent of the law. Indeed, to hold otherwise, the result of which would make it profitable to delay paying Mr. Young as long as possible, thus, in effect reducing the City's total back pay liability at Mr. Young's detriment." **ULP #3-79 District Court (1983)**. See also **ULP #3-79 Montana Supreme Court (1984)**.

81.5089: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Unfair Practice Decisions

"The Board has broad authority to remedy an unfair labor practice." **ULP #24-77 District Court**

"Such procedural steps for nonrenewal are clearly 'conditions of employment' and are subject to collective bargaining. As we said in **Wibaux Education Association v. Wibaux County High School (1978)**. 175 Mont. 331, 573 P.2d 1162: 'It is clear that arbitration [under the collective bargaining agreement] would be available on a limited basis if the "grievance" was that the school officials or School Board failed to comply with either the evaluation or hearing procedures outlined in [the agreement].' 573 P.2d at 1164. The refusal of the school district to submit this matter to arbitration violated Art. XIII, §2 of the Collective Bargaining Agreement. This was a failure to bargain in good faith and constitutes an unfair labor practice.... See **City of Livingston vs. AFSCME Montana Council No. 9 (1977)**, 174 Mont. 421, 571 P.2d 374." **ULP #30-79 Montana Supreme Court (1982)**

See also **ULP #2-75 District Court (1976)**, **ULP #17-75 District Court (1978)**, **ULP #30-78 District Court (1980)**, and **ULP #37-81 Montana Supreme Court (1985)**.

"For this Court to reverse the Board I would have to find an abuse of discretion. Given the authority cited above, I am unable to find that the Board abused its discretion." **ULP #17-87 District Court (1989)**.

81.5090: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Unit Determinations

"It is not the function of this Court to agree or disagree with the findings of the Board when there is substantial evidence supporting those findings. After reviewing the record and the applicable law, the Court finds that the evidence adequately supports the Board's finding and conclusion [that the lieutenants of the Miles City Police Department were not supervisory personnel]. Also, ... it is ordered that the findings of the Board declaring that the Shift Commanders are not supervisory employees within the statutory definition found in **MCA 39-31-103(3)** be affirmed." **UD #7-79 District Court (1980)**

See also **UD #22-77 District Court (1978)**.

81.5091: Issues Common to Appeal or Enforcement Proceeding – Standards for Review – Particular Board Decisions – Other Decisions and Orders

“Because of the conclusion noted above [related to the word ‘certification’], it is our opinion that the respondent Board had no jurisdiction to hear or in any way dispose of the petitioners’ original application and in doing so acted in excess of its statutory authority.” **CC #2-81 District Court (1983)**

81.521: Issues Common to Appeal or Enforcement Proceeding – Judgment – Affirmance of Appeal or Enforcement of Order

“The decision of the Board is affirmed in its entirety.” **ULP #24-77 District Court (1985)**

“This Court ... concludes that there is substantial evidence on the record considered as a whole to support the findings and conclusions of the Board with regard to the violations of ... [subsections] (1) and (3).” **ULP #3-79 District Court (1981)**

“Regarding the charges themselves, the District Court concluded ‘that there is substantial evidence ... to support [them]....’ Again we agree.” **ULP #3-79 Montana Supreme Court (1982)**

“We find that the District Court exceeded the proper scope of judicial review and reverse its judgment, reinstating the Board’s final order. We hold that the refusal of the school district to arbitrate whether the procedural steps for nonrenewal were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. Because the question is not properly before us, we do not address the other issue raised by appellants: Whether a school district may agree to arbitrate the substantive basis for nonrenewal of a nontenured teacher.” **ULP #30-79 Montana Supreme Court (1982)**

“The decision of the Board of Personnel Appeals is supported by substantial evidence on the whole record and there has been no error of law warranting reversal under the standards of review of the Montana Administrative Procedure Act, Section **2-4-704(2) MCA**. The decision of the agency ordering reinstatement of Susan Carlson and full back pay is hereby affirmed.” **ULP #10-80 District Court (1985)**

“The Final Order of the Board of Personnel Appeals is hereby **AFFIRMED**, and Petitioner’s request for reinstatement and back wages is **DENIED**. Teamsters request for attorney’s fees is **DENIED**; costs are **GRANTED**.” **ULP #38-80 District Court (October 1985)**

“Considering the cases cited by both parties, we do not find a sufficient substantial interest to invoke the above [‘capable of repetition, yet evading review’] doctrine. The Board of Personnel Appeals’ finding that, in the absence of an ‘impasse,’ the School District must continue to pay the salaries of expired collective bargaining contracts pending agreement on a successful contract, does not warrant further action by this Court.” **ULP #37-81 Montana Supreme Court (1985)**

“This Court in its research has found not one Montana or federal case, nor have Defendants provided or cited any, that would support Defendant’s averrance that the Board erred as a matter of law in dismissing Briggs’ unfair labor practice charge. The Board’s May 22, 1984, Order is hereby affirmed as final on the issues presented to and decided by it.” **ULP #16-83 District Court (1985)**

“[T]his Court holds in favor of Plaintiff on its Motion for Summary Judgment, and against Defendant Briggs on the Counterclaim for judicial review.” **ULP #16-83 District Court (1985)**

See also **ULP #17-75 Montana Supreme Court (1979)**, **DC #6-76 District Court (1978)**, **ULP #28-76 Montana Supreme Court (1979)**, **DC #4-78 District Court (1979)**, **ULP #20-78 Montana Supreme Court (1979)**, **ULP #3-79 District Court (1983)**, **ULP #3-79 Montana Supreme Court (1984)**, **ULP #5-80 District Court (1981)**, **ULP #38-80 Montana Supreme Court (1986)**, **DC #8-81 District Court (1982)**, and **ULP #18-83 District Court (1985)**.

“We affirm the judgment of the District Court.” **ULP #24-77 Montana Supreme Court (1986)**.

“As the record now exists before us, our only choice is to affirm the District Court. From the briefs of Mr. Klundt we are not able to determine if he desires the opportunity to purchase a transcript of the original proceeding and have that matter considered. We therefore conclude: (1) This cause is remanded to the District Court. . . . (2) In the event that the attorney for Mr. Klundt shall fail to appear before the District Court and make the above described arrangements for the transcript of the hearing before the hearing examiner within 3 days from the date of this opinion, the judgment of the District Court is affirmed.” **ULP #38-80 Montana Supreme Court (1986)**.

“Pursuant to Section **2-4-704, MCA**, and a review of the record here, the decision of the Board is **AFFIRMED**.” **ULP #17-87 District Court (1989)**.

81.522: Issues Common to Appeal or Enforcement Proceeding – Judgment – Reversal or Modification

“[T]he Decision of the Board of Personnel Appeals is reversed, the Final Order of the Board is vacated, and the unfair labor practice charge against the

Petitioner, Missoula County High School District, is dismissed.” **ULP #34-82 District Court (1985).**

See also **ULP #2-75 Montana Supreme Court (1977), DC #22-77 District Court (1978), and ULP #3-79 District Court (1981) and Montana Supreme Court (1982).**

“The District Court properly reversed the Board of Personnel Appeals order finding unfair labor practices.” **ULP #34-82 Montana Supreme Court (1986).**

81.523: Issues Common to Appeal or Enforcement Proceeding – Judgment – Remand to Board

“The administrative procedure that applies to this review (Section **59-1616**). Under the authority of that act (Section **82-4616(7)**) the matter is remanded to the Board of Personnel Appeals to proceed with the petition for decertification in accordance with Section **59-1606** and the Board’s regulations promulgated thereunder.” **DC #22-77 District Court (1978)**

“We remand, directing that the petition be dismissed.” **CC #2-81 District Court (1983)**

See also **ULP #24-77 Montana Supreme Court (1981) and ULP #10-80 Montana Supreme Court (1982).**

81.524: Issues Common to Appeal or Enforcement Proceeding – Judgment – Restraining Orders and Injunctions

See **UD #26-79 District Court (1980).**

81.526: Standards for Review – Judgment – Dismissal or Appeal or Enforcement

“Ordered, adjudged and decreed that Plaintiff’s Complaint ... is hereby dismissed with prejudice as to each of the defendants, and it is further ordered, adjudged and decreed that each Party hereto shall bear his or its own costs and expenses of litigation.” **ULP #38-80 District Court (April 1985)**

“A motion to dismiss should not be granted unless it appears beyond doubt that the non-moving party can prove no set of facts entitling him to relief.... All well-pleaded allegations of the non-moving party are deemed to be true.” **ULP #38-80 Montana Supreme Court (1986)**

See **UD #18-76 District Court (1977), UD #7-79 District Court (1980), ULP #2-73 District Court (1974), ULP #4-73 District Court (1974), ULP #28-76 District Court (1978), ULP #39-76 District Court (1978) ULP #20-78 District Court (1980), and ULP #30-78 District Court (1980).**

81.527: Standards for Review – Judgment – Other Judgments

“Pursuant to request of counsel during oral argument to reserve the question of damage, Plaintiff shall within 10 days of this Order submit to the Court a statement of present damages, disregarding attorney’s fees. Defendants shall, within 20 days thereafter, submit objections, if any, to the amount of the obligations designated by Plaintiff. A hearing by this Court, if requested, may be given if discrepancies arise. Future noncompliance with the requirements of Section 3.20 shall be subject to sanctions and further court order.” **ULP #16-83 District Court (1985)**

81.54: Issues Common to Appeal or Enforcement Proceeding – Costs and Fees

“[T]he decision of the Board of Personnel Appeals is hereby affirmed, with costs awarded to the respondent.” **ULP #3-79 District Court (1983)**

“[T]he amount due to Plaintiff would presumably be those fees outstanding and due as of the date of this Order. Future acts of noncompliance, in defiance of the present Order, shall be subject to sanctions and further Court order requiring payment of fees or equivalent amounts.” **ULP #16-83 District Court (1985)**

“The collective bargaining agreement does not specifically state that ‘damages’ under the language of Section 3.200 shall include attorney’s fees if the University Teachers Union is successful in its civil action against a unit member who fails to pay the union fee or authorized obligation. Such language could easily have been included, but without such specific language the Court will not interfered with the plain provisions of the collective bargaining agreement.” **ULP #16-83 District Court (1985)**

“The granting of attorney’s fees and costs by courts in Montana normally must rest on a statute in a complication of the proceedings and hours spent by the Teamsters (and their attorneys) toward gaining their dismissal.” **ULP #38-80 District Court (October 1985)**

“Federal courts will often apply the following test to determine the propriety of attorney’s fees awards: ‘Did plaintiff’s counsel multiply this case unreasonably, vexatiously and in bad faith? In light of the strict guidelines on judicial review, the Petitioner, and certainly his attorney, should have realized that it was improper to join the Teamsters as a Party Defendant in this particular matter. However, this Court will not in its discretion go so far as to find that the Petitioner and his attorney acted vexatiously or in bad faith under the circumstances.... This Court finds that Petitioner’s acts in naming Teamsters to the present action, were at the very least, unreasonable and constitute poor judgment.” **ULP #38-80 District Court (1985)**

81.6: Enforcement or Review of Board Decisions – Appeal to Higher Court

“Unless there is a clear preponderance of evidence against such findings [of the District Court], the Court will not reverse.” **Butte Teachers Union v. Silver Bow County (1977)**

See **ULP #2-75 District Court (1976), ULP #20-78 District Court (1981), and ULP #3-79 District Court (1981) and Montana Supreme Court (1982), and ULP #37-81 Montana Supreme Court (1985).**

See **ULP #24-77 Montana Supreme Court (1986), ULP #38-80 Montana Supreme Court (1986), and ULP #34-82 Montana Supreme Court (1986).**

81.62: Appeal to Higher Court – Stay of Lower Court Decision

See **ULO #20-78 Montana Supreme Court (1979).**

81.65: Appeal to Higher Court – Remand

See **ULP #24-77 Montana Supreme Court (1981), ULP #3-79 Montana Supreme Court (1981), and ULP #10-80 Montana Supreme Court (1982).**

“This cause is remanded to the District Court. In the event that he desires to order and pay for a transcript of the hearing before the Hearing Examiner, Mr. Klundt shall appear before the District Court and make arrangements for the ordering and payment of the transcript. If he makes that election, the District Court shall examine the transcript when received and enter its further judgment on this issue.” **ULP #38-80 Montana Supreme Court (1986).**